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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1750

HAROLD D. STUMP, JOHN HINES, M.D.,
HARRY M. COVELL, M.D. and
WARREN G. SUNDAY,
Petitioners

v.

LINDA KAY SPARKMAN and LEO SPARKMAN,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

Except that the opinion of the Court of Appeals for the Seventh Circuit is reported at 552 F.2d 172 (1977), the opinions below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The question is whether a state court judge who approves of the sterilization of a 15-year-old girl is judicially immune from liability under federal civil rights statutes when the approval is made in the absence of statutory or common law authority, without a guardian *ad litem* appointed to represent the girl's interests, without any filing in court, without any hearing, without notice to the girl or anyone on her behalf, and without any opportunity to appeal the decision to have her sterilized.

CONSTITUTION, FEDERAL AND STATE STATUTES

The relevant portions of the Constitution and federal and state statutes are adequately set forth in the Petition, except for relevant portions of I.C. §§ 16-13-13-1 through 16-13-13-4, which are set forth as an Appendix hereto.

STATEMENT OF THE CASE

In 1971 Defendant Ora McFarlin sought court approval to have her 15-year-old daughter, Linda Sparkman, sterilized. Defendant Warren G. Sunday, an attorney, prepared the "Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement." The petition contained an affidavit by Ora McFarlin stating that Linda was "somewhat retarded" even though she attended public schools and had been "passed along with other children in her age level." The purpose given by Ora McFarlin for the requested sterilization was to "prevent unfortunate

circumstances." The petition was presented to Defendant Judge Harold D. Stump of the Circuit Court of DeKalb County, Indiana, who issued the order of sterilization, termed an "approval," in an *ex parte* hearing without a guardian *ad litem* appointed to represent Linda's interests, without a hearing, without having given Linda or anyone on her behalf notice of the petition, and without the filing of any papers in his Court. The actions of the Judge effectively and completely denied Linda, or anyone on her behalf, the opportunity to appeal the decision of the Judge or to stop the operation for permanent sterilization from being performed.

After Judge Stump had signed the order, Linda was taken to a local hospital where a tubal ligation was performed. Linda was not informed of the true consequences of the surgery; in fact, she was told that the purpose of the hospital visit was to have her appendix removed. It was not until 1975, two years after Linda's marriage to Plaintiff Leo Sparkman, that Linda was informed that she had been sterilized.

Linda and Leo Sparkman brought an action seeking damages under Title 42 U.S.C. §§ 1983 and 1985 (3), contending that the actions of the Defendants in sterilizing her or causing her to be sterilized violated her Constitutional rights. Linda Sparkman attached pendent state claims for assault and battery and medical malpractice. Leo Sparkman asserted a pendent claim for loss of potential fatherhood.

The United States District Court for the Northern District of Indiana, Fort Wayne Division, granted Defendants' motions to dismiss the federal claims, holding that the actions of Judge Stump presented the only state action necessary to provide federal court jurisdiction; and that

since the actions of Judge Stump were clothed with absolute judicial immunity neither he nor his alleged co-conspirators were liable under Title 42 U.S.C. §§ 1983 and 1985 (3). Plaintiffs' remaining claims were dismissed as they were pendent to the federal causes of action.

An appeal was taken and on March 23, 1977, the Seventh Circuit Court of Appeals, with Judge Luther M. Swygert speaking for a unanimous Court, reversed the decision of the District Court and ordered the case remanded for further consistent proceedings.

ARGUMENT

I.

THE DECISION BELOW IS CLEARLY CORRECT AND DOES NOT CONFLICT WITH PRIOR SUPREME COURT DECISIONS

Petitioners would have this Court believe that the United States Court of Appeals for the Seventh Circuit has in this case made new law in contradiction to *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335 and *Pierson v. Ray,* 386 U.S. 547. They ridicule the Seventh Circuit's unanimous opinion as merely "paying lip services to the unequivocal holdings of *Bradley v. Fisher, supra,* and *Pierson v. Ray, supra.*" (Petition, page 6.) Petitioners maintain that as a judge of a court of general jurisdiction, Harold D. Stump was entitled to the protection of the doctrine of immunity for any act he performed while Judge. This Court has never so held. Rather, this Court has held quite differently: Any judge performing a judicial act within his jurisdiction is entitled to judicial immunity for those acts. A judge is not entitled to immunity for acts in "clear absence of all jurisdiction." *Bradley, supra,* at 351.

The opinion of the Court of Appeals in this case was, for the reasons cited therein, that Judge Stump acted extrajudicially, in clear absence of all jurisdiction. The Court of Appeals was not paying mere lip service to the holdings of this Court—it quite carefully examined the outrageous fact situation presented by this case, and in applying the fact situation to the law unanimously found that Judge Stump was not entitled to the protection of the doctrine of immunity because he had acted extrajudicially and in clear absence of all jurisdiction.

It would serve no purpose here for Respondents to repeat and support the cogent analysis of the Court of Appeals' application of the fact situation in the case at bar to the law of judicial immunity as established by this Court. Suffice it to say that it is clear, as the Court of Appeals found, that Judge Stump acted contrary to the Indiana statutes regarding sterilization[1] and contrary to the common law as shown by *Holmes v. Powers,* 439 S.W.2d 579 (Ky. Ct. App. 1968) and *Frazier v. Levi,* 440 S.W.2d 393 (Tex. Ct. Civ. App. 1969).

The fact that the DeKalb Circuit Court is a court of general jurisdiction having jurisdiction "in all cases at law and in equity" (I.C. § 33-4-4-3) cannot possibly mean, as Petitioners maintain, that Judge Stump or any other judge would be free to perform any act upon any person which the whim of the judge might dictate. This statute must be read in conjunction with common sense and it must be interpreted with common sense. Can a judge cut off arms and legs merely because the power to do so is not specifically denied him by the statute granting his jurisdiction? If justice means anything, it means that a judge cannot perform such an act free from liability. Therefore, the analysis of this statute by the Court of Appeals *must* be correct.

Petitioners relied in the Court of Appeals and here upon *A.L. v. G.R.H.*, — Ind. App. —, 325 N.E.2d 501 (1975) as an indication that Judge Stump could not have known that there were common law and statutory bars preventing him from ordering the sterilization of Linda Sparkman.

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[1] Indiana Code §§ 16-13-13-1 through 16-13-13-4 (Repealed, 1974) authorized the sterilization of certain institutionalized persons under rigid procedures designed to protect the interests of those persons, including the right of appeal. See Appendix, *infra*.

(Petition, pages 7, 8.) As the Court of Appeals properly noted (Petition, pages A12, A13) and as the decision of the Indiana Appellate Court in *A.L. v. G.R.H.* establishes, the statutory and common law bars did exist in 1971 and, therefore, this Indiana decision supports the accuracy of the opinion by the Court of Appeals in this case.

Petitioners argue that there were Indiana statutes authorizing a parent to consent to medical treatment on a child (I.C. § 16-8-4-2) and making the consent binding on the patient (I.C. § 16-8-3-1); and as a result of these statutes, Judge Stump impliedly had jurisdiction to direct the sterilization of Linda Sparkman because the mother had consented to it. (Petition, page 8.) This argument carried no weight with the District Court in this case (Petition, page A6), with the Court of Appeals in this case (by implication) or with the Indiana Appellate Court in *A.L. v. G.R.H., supra* (by implication). The only logical or Constitutional interpretation of these consent statutes would be that a parent could consent to *necessary* surgical treatment on a child. See *In re Richardson,* 284 S.2d 185 (La. App. 1973); *Lausier v. Pescinski,* 67 Wis.2d 4, 226 N.W.2d 180 (Wis. 1975). The sterilization of Linda Sparkman was *not* necessary surgery and it deprived her of her Constitutionally protected rights. *Skinner v. Oklahoma,* 316 U.S. 535.

It is not merely paying lip service, as Petitioners maintain, for the Court of Appeals to have correctly decided that Judge Stump acted in the clear absence of jurisdiction and that he is therefore not entitled to reach the protection of the doctrine of immunity as that doctrine has been established. In their Statement of the Case and in their Argument, Petitioners have overlooked the outrageous disregard Judge Stump demonstrated for the rights of Linda Sparkman. The manner in which he

approved of her sterilization was calculated to hide the sterilization from her, which sterilization was not authorized by legislation or common law. The action of Judge Stump was so taken as to prevent Linda or anyone on her behalf from seeking recourse through the courts to prevent the sterilization from taking place.

What Petitioners now seek is a rehearing of the factual issues decided by a unanimous Seventh Circuit Court of Appeals. To do so they have attempted to persuade this Court that what was a correct application of the fact situation to the law regarding judicial immunity was rather a misinterpretation of the law set forth in *Bradley v. Fisher, supra,* and *Pierson v. Ray, supra.* What the Court of Appeals really did was correctly apply the facts to the law. In this case Judge Stump acted so totally without jurisdiction as to deny him the protection of the doctrine of immunity.

II.

THIS CASE DOES NOT WARRANT REVIEW

Petitioners maintain that the decision of the Court of Appeals if allowed to stand "would render meaningless the standards for judicial immunity as established by this Court in *Bradley v. Fisher, supra,* and *Pierson v. Ray, supra,*" and would adversely affect the liability of every trial court judge in our country. (Petition, page 14.) No judge need be frightened by the decision of the Seventh Circuit Court of Appeals in this case, unless the judge acts extrajudicially or in the complete absence of jurisdiction. That is what the Court of Appeals' decision holds in this case and that is precisely what this Court held in *Bradley v. Fisher* and *Pierson v. Ray.*

For very good reason, this Court has never held that a judge is entitled to immunity for every act which he might do while holding the title of Judge. This Court has required only that a judge perform a judicial act within his jurisdiction before he is entitled to immunity for his actions. This is not a stringent requirement. This doctrine even allows a judge who acts maliciously, but within his jurisdiction, to reach the shield of judicial immunity. *Pierson v. Ray, supra,* at 554. Fortunately, because of the almost unfailingly high calibre of our judiciary at each level throughout the United States, it is rare that a judge needs to reach for the protection of the doctrine of immunity. However, for the ever-so-rare instance when a judge does act in the complete absence of jurisdiction, it is absolutely necessary under our judicial structure that the doctrine of immunity not prevent recourse.

The public has faith in our judiciary and complies even with distasteful orders. If blanket immunity were granted our judiciary and judges were free to commit atrocities, without liability, the public faith in our judiciary would reasonably be destroyed. Our judicial system needs to maintain the faith the public has shown in it. The public deserves no less.

If our judicial system is to have any checks, it is imperative that the doctrine of immunity remain as set forth in *Bradley v. Fisher, supra,* and *Pierson v. Ray, supra.* The fact that Judge Stump's actions in the instant case took him outside of the protection of the doctrine of immuntiy must not be reason to change the doctrine to allow blanket immunity to every judge in every case.

It is obvious that the issue presented in this case is uniquely narrow and is predicated upon a fact situation which is so unlikely to be repeated that it does not warrant review by this Court. If this Court were to restate the

doctrine of immunity to grant immunity to a judge who acts as Judge Stump acted,[2] the door would be open to dangerous abuse. As the doctrine now stands, lower courts can follow this Court's directives and in those very rare instances where a judge acts without jurisdiction, hold him liable. For many years the presently existing doctrine of immunity has reasonably guided the lower courts. A rare instance of judicial abuse should not be reason to change the doctrine which presently fairly protects the judiciary while allowing for liability in very rare, maverick instances.[2]

III.

RESPONSE TO *AMICUS CURIAE* BRIEF

The State of Indiana has filed an *amicus curiae* brief in support of the Petition for Writ of Certiorari. The significant portion of the State's brief argues that the determination of whether or not judicial immunity should attach to the actions of Judge Stump should be a determination made under principles of law of the State of Indiana rather than federal law. The State of Indiana is wrong. Federal law, not state law, applies and determines the adequacy of defenses asserted in federal civil rights actions. *Scheurer v. Rhodes,* 416 U.S. 232; *Pierson v. Ray, supra; Monroe v. Pape,* 365 U.S. 167. Additionally, in 1974 the United States Court of Appeals for the Sixth Circuit said:

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[2] Senior District Judge William G. East of the District of Oregon sat by designation on this case in the Seventh Circuit Court of Appeals. It is informative that from his experience as a trial level judge he held that the actions of Judge Stump in directing the sterilization of Linda Sparkman were outside of Judge Stump's jurisdiction.

> We hold at the outset that the extent of the defendants' insulation from liability under the Civil Rights Act cannot properly be determined by reference to the local rule in Michigan. Surely each state cannot be left to decide for itself which of its officials are completely immune from liability for depriving a citizen of rights granted by the Federal Constitution. The question must be decided as a matter of general law. (*Marr v. Rife,* 503 F.2d 735 at 740 [6th Cir. 1974], quoting from *Nelson v. Knox,* 256 F.2d 312 [6th Cir. 1958].)

Even if Indiana law were to apply in determining whether Judge Stump had judicial immunity for his act in approving of the sterilization of Linda Sparkman, it appears clear that he would not be entitled to judicial immunity. In *State v. Libbert,* 96 Ind. App. 84, 177 N.E. 873 (1931), rehearing denied, 96 Ind. App. 84, 180 N.E. 757 (1932), the Indiana Appellate Court, sitting *en banc,* held that a Judge who committed a Defendant to jail after the expiration of a suspended sentence could be liable in civil damages. The Court held that judicial immunity does not extend to an act done outside of a court's jurisdiction:

> Where there is a total lack of jurisdiction of either the person or of the subject-matter, the judge's office is no protection to him, and though he exercise judicial functions, his acts are absolutely void. 177 N.E. at 875.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

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Indiana Code § 16-13-13-1 (Repealed, 1974). *Authorization.*—Whenever the superintendent of any hospital or other institution of this state, or of any county in this state, which has the care or custody of insane, feeble-minded or epileptic persons, shall be of the opinion that it is for the best interests of the patient and of society that any inmate of the institution under his care should be sexually sterilized, such superintendent, if a lawfully licensed physician or surgeon, is hereby authorized to perform, or cause to be performed by some capable physician or surgeon, an operation or treatment of sterilization on any such patient confined in such institution afflicted with hereditary forms of insanity that are recurrent, epilepsy, or incurable primary or secondary types of feeble-mindedness: Provided, That such superintendent shall have first complied with the requirements of this act [16-13-13-1—16-13-13-6]. [Acts 1927, ch. 241, § 1, p. 713; 1937, ch. 244, § 1, p. 1164].

Relevant portions of Indiana Code § 16-13-13-2 (Repealed, 1974). *Petition by superintendent to governing board—Notice—Hearing—Order.* A copy of said petition shall be served upon the inmate together with a notice in writing designating the time and place in said institution or elsewhere, not less than thirty [30] days before the presentation of such petition to said board, when and where said board may hear and act upon such petition. Such inmate shall be produced before such board of [at] such hearing.

• • • • •

Any party to the said proceedings shall have the right to be represented by counsel at such hearings, and to cross-examine all witnesses produced by and who testify at the instance of the opposite party.

Relevant portions of Indiana Code § 16-13-13-3 (Repealed, 1974). *Appeal to circuit court—Stay of proceedings.*—From any order so entered by the Indiana council for mental health [commissioner of mental health] the said inmate or his guardian or parent or next friend shall, within thirty [30] days after the date of such order, have an appeal as of right to the circuit court of the county in which said institution is situated, . . .

• • • • •

The pendency of such appeal shall stay proceedings under the order of the council [commissioner of mental health until the appeal be determined.

Indiana Code 16-13-13-4 (Repealed, 1974). *Appeal from circuit to Supreme Court—Act of 1927.*—Any party to such appeal in the circuit court may within thirty [30] days after the date of the final order therein, apply for an appeal to the Supreme Court, which Supreme Court may grant or refuse such appeal and shall have jurisdiction to hear and determine the same upon the record of trial in the circuit court and to order the circuit court to make in the matter such order as may to the Supreme Court seem proper. The pendency of an appeal in the Supreme Court shall operate as a stay or proceedings under any orders of the board or of the circuit court until the appeal be determined by the Supreme Court. [Acts 1927, ch. 241, § 4, p. 713.].